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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KRISTEN ANDROS,

Plaintiff and Appellant,

v.

SIMON PROPERTY GROUP, INC., et al.,

Defendants and Respondents.

G044353

(Consol. with G044764)

(Super. Ct. No. 30-2009-00119445)

O P I N I O N

Appeals from a judgment and a postjudgment order of the Superior Court of Orange County, Steven L. Perk, Judge. Affirmed.

Buchalter Nemer, Robert M. Dato; Law Office of Richard Meaglia and Richard Meaglia for Plaintiff and Appellant.

Epstein Becker & Green, William O. Stein and Brendan Y. Joy for Defendants and Respondents.

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INTRODUCTION

Plaintiff Kristen Andros was employed by defendant The Mills Corporation (Mills) as a vice-president of leasing when, in 2007, defendant Simon Property Group, Inc. (Simon), acquired Mills in a joint venture with Farallon Capital Management. Simon thereafter hired Andros as a vice-president of leasing in its Mills division. When Simon faced financial difficulties in 2008, Andros was selected for layoff. Andros sued Mills and Simon¹ for, inter alia, breach of contract, based on allegations Andros was not paid certain commissions and severance. Following a bench trial, the trial court entered judgment in favor of defendants and granted their postjudgment motion for prevailing party attorney fees. Andros appealed from the judgment and the postjudgment order awarding attorney fees, and we have consolidated Andros's appeals.

We affirm. The trial court did not err by relying on extrinsic evidence to interpret the term "Net Present Value" in determining whether Andros was owed commissions under Mills's commission plan. Substantial evidence supported the trial court's findings that Mills's severance plan was terminated in April 2008, and that Andros was not entitled to severance under that plan when she was laid off by Simon in December 2008. Substantial evidence also supported the court's finding that Andros was not entitled to severance pursuant to the severance pay policy contained in Simon's employee handbook because severance pay under the policy was expressly conditioned on Andros signing a general release agreement which she refused to sign.

Andros challenged the attorney fees award solely on the ground the underlying judgment was entered in error. Because we conclude the trial court did not err in entering judgment, Andros's appeal from the postjudgment order awarding attorney fees is without merit.

¹ We refer to Mills and Simon collectively as defendants.

FACTS²

In 1999, Andros became employed by Mills as a leasing representative on an at-will basis. Mills was a real estate company that owned and operated full-priced shopping malls and outlet malls. Andros's primary job function was to find tenants and lease them space at the shopping malls. In November 2004, Andros became a leasing director.

Andros was paid a base salary plus an incentive bonus that was governed by Mills's 1999 bonus plan. Under the 1999 bonus plan, leasing representatives were eligible for an incentive bonus in an amount up to 40 percent of their base salaries, contingent on Mills's financial situation and the leasing representatives "meeting their numbers."

In 2005, Mills began to have "severe financial problems" and looked to merge with another real estate company. In an effort to appear more attractive to potential buyers, Mills "increased leasing revenue through higher occupancy rates." Mills's leasing representatives' performance was critical to increasing the occupancy rates.

In May 2006, Mills revised the compensation plan for its leasing representatives and instituted a commission plan that became retroactively effective January 1, 2006 (the Mills Commission Plan). The Mills Commission Plan expressly stated that it replaced all prior bonus plans. The Mills Commission Plan "was devised as a short-term solution to retain leasing personnel and keep Mills' malls occupied while Mills looked for a buyer. Its goal was to pay the leasing representatives more than they could have earned under Mills' 1999 Bonus Plan and to give them an immediate payment as incentive to stay at Mills. . . . The Commission Plan was a short term solution to help increase revenue and retain leasing representatives during the period of financial crisis."

² This summary of facts relevant to the issues raised on appeal is based on the trial court's findings as contained in the statement of decision.

Also, in light of the uncertainty among employees, attendant to efforts to find a buyer, Mills implemented a severance plan to ensure retention of employees (the Mills Severance Plan). The Mills Severance Plan stated that any Mills's successor could terminate the Mills Severance Plan one year after a change in control, after board of director approval, and after three months' notice to participants. In December 2006, Andros became a vice-president of leasing and her main job duties remained focused on finding tenants for Mills's malls.

In April 2007, Simon, through a joint venture with Farallon Capital Management, entitled SPG-FCM Ventures, LLC (SPG-FCM), acquired Mills. SPG-FCM was a subsidiary of Simon and, after the acquisition, managed Mills's properties. Simon offered Andros a job as a vice-president of leasing "with the same title and job duties she had at Mills," and Andros accepted Simon's offer.

Andros's offer letter was signed by Simon's senior vice-president of human resources, Irv Kravitz. Kravitz informed Andros in the offer letter that after the change in control of Mills occurred, Andros would continue on Mills's benefits and compensation plans until Mills's plans were consolidated with Simon's plans. The offer letter explained that Mills's compensation and benefits plans ultimately would be replaced by Simon's compensation and benefits plans. It stated that when this change occurred, it would not result in a material change to the benefits that Andros had at Mills. The offer letter did not state whether there would be a material change in Andros's compensation after the Mills and Simon compensation plans were consolidated, although it stated that Andros's compensation rights would be "no less favorable" than what she had been provided at Mills prior to the acquisition. At Mills, Andros received a salary and commissions. At Simon, she was also to receive a salary, plus a bonus and the right to participate in Simon's performance-based restricted stock agreement. Kravitz "considered these types of plans to be no less favorable to the types of plans she was on at Mills."

On April 18, 2007, about two weeks after Simon's acquisition of Mills, all former Mills's employees including Andros, received a memorandum from Simon, informing them that the Mills Commission Plan would be in place until December 31, 2007. Simon thereafter placed Andros on the same bonus plan as all other vice-presidents of leasing at Simon.

On March 27, 2008, SPG-FCM's board of directors unanimously passed a resolution that terminated the Mills Severance Plan. This action was in accordance with the terms of the Mills Severance Plan requiring that its termination could be effected by the board of directors of Mills's successor. On April 28, over one year after SPG-FCM's acquisition of Mills, Kravitz sent a memorandum to former Mills's employees including Andros, providing the employees the requisite 90-day notice that the Mills Severance Plan had been terminated.

Simon's leasing department faced financial difficulties in 2008. Consequently, in December 2008, Simon laid off 36 employees, including Andros. Simon offered Andros severance pay pursuant to Simon's severance pay policy which required Andros to sign a general release. Andros refused to sign a general release and was not given severance pay.

PROCEDURAL HISTORY

Andros filed a complaint alleging a breach of contract claim against Mills, a breach of contract claim against Simon, a breach of the implied covenant of good faith and fair dealing claim against Simon, a promissory fraud claim against Simon, and an unfair business practices claim against defendants. The complaint was based on allegations, inter alia, that Andros's employment was terminated without good cause and that Andros was not paid certain commissions and other benefits to which she believed she was contractually entitled.

Following a bench trial, the court issued a minute order stating the court's verdict in favor of defendants as to all causes of action. At Andros's request, the trial court issued a statement of decision. The court overruled Andros's objections to the statement of decision, and entered judgment in defendants' favor. Andros appealed from the judgment.

The trial court granted defendants' motion for prevailing party attorney fees in the total amount of \$262,333.44. Andros appealed from the court's postjudgment order. We consolidated Andros's two appeals for purposes of oral argument and decision on appeal.

DISCUSSION

I.

THE TRIAL COURT DID NOT ERR BY ENTERING JUDGMENT IN DEFENDANTS' FAVOR.

Andros contends the judgment should be reversed because (1) the trial court erroneously relied on extrinsic evidence interpreting the term "Net Present Value" as contained in the Mills Commission Plan; (2) insufficient evidence showed the Mills Severance Plan had been effectively terminated before Andros's employment was terminated; and (3) Simon breached its contract by failing to pay Andros severance under Simon's severance pay policy, as a matter of law. We address and reject each of Andros's contentions for the reasons explained, *post*.

A.

Standards of Review and General Contract Principles

"Where the court issues a statement of decision, it need only recite ultimate facts supporting the judgment being entered. [Citation.] If the judgment is supported by factual findings based on substantial evidence, the reviewing court affirms. [Citation.] Conflict in the evidence is of no consequence." (*People v. Orange County Charitable Services* (1999) 73 Cal.App.4th 1054, 1071.) "When a trial court's factual determination

is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins and ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.*” (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.)

In this appeal, Andros argues, *inter alia*, the trial court misinterpreted certain contracts. We apply basic rules of contract interpretation in our review of the trial court’s interpretation of those contracts. (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955 (*Founding Members*).) The basic goal of contract interpretation is to give effect to the parties’ mutual intent at the time they entered the contract. (*Ibid.*) “When a contract is reduced to writing, the parties’ intention is determined from the writing alone, if possible. [Citation.] ‘The words of a contract are to be understood in their ordinary and popular sense.’ [Citations.] [¶] Extrinsic evidence is admissible to prove a meaning to which the contract is reasonably susceptible. [Citations.] If the trial court decides, after receiving the extrinsic evidence, the language of the contract is reasonably susceptible to the interpretation urged, the evidence is admitted to aid in interpreting the contract.” (*Ibid.*)

“The ultimate construction placed on the contract might call for different standards of review. When no extrinsic evidence is introduced, or when the competent extrinsic evidence is not in conflict, the appellate court independently construes the contract. [Citations.] When the competent extrinsic evidence is in conflict, and thus requires resolution of credibility issues, any reasonable construction will be upheld if it is supported by substantial evidence.” (*Founding Members, supra*, 109 Cal.App.4th at pp. 955-956.)

B.

The Trial Court Did Not Err in Relying on Extrinsic Evidence to Interpret the Term “Net Present Value” in the Mills Commission Plan.

Andros contends the trial court erred by relying on extrinsic evidence in interpreting the term “Net Present Value” contained in the Mills Commission Plan. She argues the language of the Mills Commission Plan was not reasonably susceptible to the interpretation urged by the extrinsic evidence.³ Therefore, Andros contends, such evidence should not have been considered and insufficient evidence supported the trial court’s finding she was not owed commissions under the Mills Commission Plan. She argues the trial court should have awarded her \$173,444.43 in unpaid commissions plus statutory penalties under Labor Code section 203, subdivision (a) and prejudgment interest. For the reasons we will explain, the trial court did not err by considering the extrinsic evidence and that evidence constituted substantial evidence to support the court’s interpretation of the Mills Commission Plan. (*Founding Members, supra*, 109 Cal.App.4th at pp. 955-956.)

The Mills Commission Plan stated that the “Commission Payout” is “the amount that a Participant will receive in accordance with Section V” of the Mills Commission Plan. The Mills Commission Plan further stated at section V.A.: “The Commission Payout for any Qualifying Lease is the product of the Net Present Value of the Qualifying Lease multiplied by the applicable Commission Percentage Factor.” The

³ Andros also argues in her opening brief that extrinsic evidence should not have been admitted to explain the meaning of the Mills Commission Plan because the language of the Mills Commission Plan was plain and unambiguous. As a panel of this court explained in *Founding Members, supra*, 109 Cal.App.4th at page 955, “[t]he test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.” We therefore focus on Andros’s arguments regarding whether the extrinsic evidence was relevant to prove a meaning to which the language of the Mills Commission Plan was reasonably susceptible.

term “‘Net Present Value’ of a Qualifying Lease” was defined in the Mills Commission Plan as “the product of: (a) Gross Rent minus Costs multiplied by (b) the Discount Factor.” The term “Discount Factor” was defined as 8 percent.

At trial, Robert Swarts testified regarding the proper interpretation of the term “Net Present Value” as it appears in the Mills Commission Plan. Swarts, who worked for Mills for eight years and then for Simon after the acquisition, was Simon’s director of lease services at the time of trial. His responsibilities included reviewing lease transactions and obtaining approval for them, and performing net present value calculations.

Swarts testified the term “Net Present Value” in the Mills Commission Plan is a “defined financial term that people all over the world use.” He explained that “it’s so defined, it’s part of the Excel software as a standard function.” He testified that net present value is determined according to a standard formula, contained in trial exhibit No. 234, which takes the series of cash flows projected to occur over the number of years of a lease, and discounts them to their present value (the standard formula). Swarts explained, “[t]he gross rent less the costs in each year has to be discounted by the number of—by that number of years to get a present value, and each year has to be summed.” Otherwise, the cash flows from future years of the lease would not be given a present value, as contemplated by the term “net present value,” and commission calculations would be inflated.

Andros testified that the net present value should be determined by summing all of the cash flows for each year of the lease and then discounting that sum once by 8 percent. Andros did not offer any expert witness testimony challenging Swarts’s testimony that the term “Net Present Value” was a standard financial term.

In support of her interpretation of the term “Net Present Value,” Andros offered into evidence a document she received when she was given the Mills Commission Plan (marked as trial exhibit No. 61). That document was entitled “NPV

Commission Program aka Mills & Money” and summarized the Mills Commission Plan. Andros specifically relied on “Example A” contained in that document, which stated: “1,000 SF [(square feet)] space in a ‘B’ center is leased at a net present value \$50 PSF [(per square foot)] annual gross rent for 10 years with a \$100,000 allowance. The total NPV [(net present value)] rent is \$500,000 less the \$100,000 allowance for an NPV of \$400,000. The commission factor is 1% so the commission is \$4,000.” Swarts testified, however, that Example A was not inconsistent with the standard formula for net present value because Example A showed the standard formula had already been applied to determine a net present value of \$50 per square foot.

In the statement of decision, the trial court found Andros was not owed any commissions under the Mills Commission Plan. The court noted Andros had identified a single lease in 2006, for which she claimed she was not paid the full commission earned under the Mills Commission Plan. The court stated that it found Swarts had correctly calculated Andros’s 2006 commission under the Mills Commission Plan by using the standard formula for net present value. The court observed that Andros’s commission calculations “failed to account for time as a factor in her applied formula” even though “[t]ime as a factor in this calculation was confirmed by the example given in Exhibit 61.” The trial court concluded, “the commissions calculations for Plaintiff for 2006 were proper, and Plaintiff was not ‘short paid’ or owed any commissions from Mills for this time.”

The trial court did not err by admitting Swarts’s testimony regarding the standard formula for net present value and its application to the Mills Commission Plan. His testimony was relevant to prove a meaning of the term “Net Present Value” to which the language of the Mills Commission Plan was reasonably susceptible. (See *Founding Members, supra*, 109 Cal.App.4th at p. 955.) His testimony constituted substantial evidence to support the trial court’s calculations and finding that Andros was not owed commissions under the Mills Commission Plan, as it explained the calculation of net

present value discounts each and every year as of the proper time. Andros's explanation does not.

Citing *Peiser v. Mettler* (1958) 50 Cal.2d 594, 610, Andros argues Swarts's testimony was inadmissible custom or usage evidence. *Peiser v. Mettler* does not assist Andros because in that case, custom and usage evidence was inadmissible because it varied or contradicted the terms of the lease agreement. (*Ibid.*) Here, as discussed *ante*, Swarts's testimony that the term "Net Present Value" is a standard financial term of art requiring the use of the standard formula does not vary or contradict the terms of the Mills Commission Plan.

Andros also argues Swarts's custom or usage evidence should not have been considered because she was unaware of the standard formula for net present value when she received the Mills Commission Plan. "“Neither law nor equity requires that every term and condition of an agreement be set forth in the contract. [Citations.] The usual and reasonable terms found in similar contracts can be looked to, unexpressed provisions of the contract may be inferred from the writing, external facts may be relied upon, and custom and usage may be resorted to in an effort to supply a deficiency if it does not alter or vary the terms of the agreement. [Citations.]" [Citations.] At bottom, "[i]f the parties have concluded a transaction in which it appears that they intend to make a contract, the court should not frustrate their intention if it is possible to reach a fair and just result, even though this requires a choice among conflicting meanings and the filling of some gaps that the parties have left."”" (*Denver D. Darling, Inc. v. Controlled Environments Construction, Inc.* (2001) 89 Cal.App.4th 1221, 1237.) We find no error.

C.

Substantial Evidence Showed the Mills Severance Plan Was Effectively Terminated Before Andros Was Laid Off by Simon.

Andros contends insufficient evidence supported the trial court's finding the Mills Severance Plan was effectively terminated before Andros was laid off by

Simon. She therefore argues the trial court erred by failing to award her severance pay in the amount of \$227,973.33, plus statutory penalties and prejudgment interest, under the terms of the Mills Severance Plan.

The Mills Severance Plan stated in relevant part: “The Company reserves the right to amend, modify, suspend or terminate this Plan by action of the Board at any time upon three (3) months’ notice to the Participants generally; provided that no such amendment, modification, suspension or termination that has the effect of reducing or diminishing the right of any Participant, shall be effective without the written consent of such Participant, for a period of one year following the Change in Control if adopted (i) after a Change in Control or (ii) before a Change in Control but in anticipation thereof.” The Mills Severance Plan defined the term “Board” as “[t]he Board of Directors of the Company,” and the term “Company” as “The Mills Corporation and any successor thereto.”

Substantial evidence showed the board of directors of Mills’s successor took the requisite action to terminate the Mills Severance Plan, in March 2008. Evidence was provided at trial that in April 2007, Mills was purchased by a joint venture between Simon and Farallon Capital Management, known as SPG-FCM, and SPG-FCM managed Mills’s portfolio.

At trial, Tracy Reinholt, a senior paralegal employed by Simon, testified that she was directed by Simon’s general counsel to draft a document entitled “Unanimous Written Consent of the Board of Directors of SPG-FCM Ventures, LLC to Action Without a Meeting” (the consent). In addition to serving as the custodian of records for Simon, SPG-FCM, and Simon’s subsidiaries, Reinholt’s job duties included preparing organizational and closing documents, minutes, resolutions, and other documentation pertaining to board meetings.

Reinholt prepared the consent and forwarded it to each of Simon's directors and to Farallon Capital Management's directors for signature. The consent was executed by the directors effective March 27, 2008.

The consent states in part:

"The undersigned, being all of the members of the Board of Directors (the '*Directors*') of SPG-FCM Ventures, LLC, a Delaware limited liability company (the '*Company*'), hereby consent to the following action to be taken without a meeting and direct that this Consent be filed with the minutes of the proceedings of the Company:

"**WHEREAS**, the Company is (i) the successor in interest to The Mills Corporation ('*TM[]C*') and (ii) the sole member [of] TMLP GP, LLC, a Delaware limited liability company ('*GP LLC*'), which is the sole general partner of The Mills Limited Partnership, a Delaware limited partnership (the '*Operating Partnership*');

"**WHEREAS**, effective October 25, 2006, the Board of Directors of TMC established The Mills Corporation Severance Plan (as amended from time to time, the '*General Plan*'); and [¶] . . . [¶]

"**NOW, THEREFORE, IT IS:**

"**RESOLVED**, that the Board deems it necessary, appropriate and advisable and in the best interests of the Company, for itself and (i) as the successor in interest to TMC and (ii) as the sole member of GP LLC, for itself and as the sole general partner of the Operating Partnership to (a) terminate the General Plan effective April 4, 2008, . . . and (c) enter into such other documents as may be necessary and appropriate to accomplish the matters stated above with such changes, deletions, additions or modifications thereto as may be deemed necessary, appropriate or advisable by any one of the President, any Vice President, the Secretary or any Assistant Secretary, the Treasurer or any Assistant Treasurer of the GP LLC (the '*Authorized Officers*')."

Kravitz, who worked for Simon as senior vice-president, human resources and corporate operations, testified that on April 28, 2008, he sent a memorandum to all

former Mills's employees, which stated: "Please note that, The Mills Corporation Severance Plan is being terminated. In the event of a Qualified Termination of employment, as defined by the plan, benefits under The Mills Corporation Severance Plan will continue for ninety days from the date of this notice." Andros admitted receiving the memorandum. Neither the Mills Severance Plan nor the consent required that any further notice be given or action be taken to effect the termination of the Mills Severance Plan. Andros continued working for Simon until she was laid off in December 2008.

In the statement of decision, the trial court found Andros was not entitled to severance under the Mills Severance Plan for the following reasons: "Mills' Severance Plan provided that Simon could terminate Mills' Severance Plan with 90 days['] notice and with board approval. . . . Simon sent Plaintiff and all former Mills' employees working at Simon notice on April 28, 2008 that Mills' Severance Plan was being terminated 90 days from that date. . . . Prior to sending this notice out to all former Mills' employees, the Board of Directors of SPG-FCM Ventures, LLC passed a board resolution terminating the Mills Severance Plan. . . . The Mills' Severance Plan was terminated. Plaintiff was not eligible for severance under Mills' Severance Plan. After Mills' Severance Plan was terminated, Plaintiff continued to work for Simon and did not resign." The evidence, described *ante*, was sufficient to support the trial court's findings.

D.

*Substantial Evidence Showed Andros Was Not Entitled to Receive
Severance Pay Under Simon's Severance Pay Policy.*

Andros argues Simon's employee handbook established Simon's contractual obligation to provide her severance when she was laid off. Andros asserts insufficient evidence supported the trial court's finding Simon did not breach a contractual obligation to pay Andros \$31,692.30 in severance under its policy. Andros's argument is without merit.

Page 28 of Simon's employee handbook states that under certain circumstances, an employee will be offered severance pay upon the termination of that employee's employment with Simon. Page 28 also states: "Employees are required to sign a waiver and release agreement, in a form that is acceptable to the Company, as a condition of receiving severance pay."

Kravitz testified that Andros was offered a severance agreement, but she did not accept it. (A copy of the separation agreement and general release that was offered to Andros was admitted into evidence as trial exhibit No. 46.) Andros admitted at trial that when she was notified of her layoff, Simon offered her a severance agreement, but she did not sign the paperwork. Andros testified as follows:

"Q. At the time you were notified you were being laid off, Simon offered you severance; correct?

"A. Yes.

"Q. And you didn't say during your termination time that I'm supposed to get severance under The Mills plan, not under the Simon plan, did you?

"A. No.

"Q. And you turned down the Simon severance offer; correct?

"A. No, I just didn't sign the paperwork.

"Q. You didn't accept it?

"A. I did not receive a check, no.

"Q. Well, you didn't accept the severance from Simon, did you?

"A. I didn't receive any severance from Simon.

"Q. You were given a plan; correct?

"A. Correct.

"Q. Did that plan require that you sign the plan?

"A. Yes.

"Q. Did you sign it?

“A. No.”

In the statement of decision, the trial court stated, “Plaintiff was also offered severance at Simon when she was laid off. (Exhibit 46). The amount of severance offered to Plaintiff was based upon her employment with Simon, not Mills. Plaintiff proffered no testimony that the amount offered by Simon was miscalculated. Plaintiff testified that she refused the severance, choosing instead to pursue this litigation.” The evidence, described *ante*, was sufficient to support those findings.

In her opening brief, Andros argues defendants “attempted to require Andros to sign a general release in order to obtain a much smaller severance payment under the Simon Severance Plan. But that ‘requirement’ was part of a Simon employee handbook that Andros never received.” Andros apparently argues that she is contractually entitled to the severance pay provided in Simon’s employee handbook without having to satisfy the express condition she sign a general release, because she never received a copy of the employee handbook. Andros’s argument borders on the frivolous. It is evident Andros made the strategic decision to forego severance pay pursuant to the severance pay policy contained in Simon’s employee handbook to preserve her right to sue defendants for, *inter alia*, additional commissions and severance pay under the Mills Commission Plan and the Mills Severance Plan, respectively. We find no error.

II.

WE AFFIRM THE TRIAL COURT’S PREVAILING PARTY ATTORNEY FEES AWARD.

Andros also appealed from the postjudgment order awarding \$262,333.44 in attorney fees to defendants. Andros asserts she “does not contest the *amount* of fees that the trial court awarded. However, if the judgment is reversed, defendants would no longer be the prevailing parties and the order awarding attorneys’ fees must be reversed as well.” For the reasons explained *ante*, we affirm the judgment in its entirety. We therefore also affirm the postjudgment order awarding attorney fees.

DISPOSITION

The judgment and postjudgment order are affirmed. Respondents shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.